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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C.

FEB 9 1993

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of

Implementation of Sections 11  
and 13 of the Cable Television  
Consumer Protection and  
Competition Act of 1992

Horizontal and Vertical Ownership  
Limits, Cross Ownership Limitations  
and Anti-trafficking Provisions

MM Docket No. 92-264

COMMENTS OF

THE ASSOCIATION OF INDEPENDENT TELEVISION STATIONS, INC.

David L. Donovan  
VP/Legal &  
Legislative Affairs

Association of  
Independent Television  
Stations, Inc.  
1200 18TH Street, NW  
Suite 502  
Washington, DC 20036

February 9, 1993

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THE ASSOCIATION OF INDEPENDENT TELEVISION STATIONS, INC.

The Association of Independent Television Stations, Inc. (INTV) strongly supports enactment of ownership limits pursuant to the 1992 Cable Television and Consumer Protection Act. Our interest in this proceeding was best summed up by the FCC in its 1990 Cable Report:

Cable operators' incentives to deny carriage or to provide disadvantageous carriage (i.e. frequent or ill timed channel positioning) to program services in which they have no financial interest appears particularly great as against local broadcasters. This creates a market disadvantage in local commercial broadcaster's ability to compete against cable operators for advertising revenues.<sup>1</sup>

INTV will not belabor the need for horizontal and vertical restraints in cable. Congressional concerns in this area are well

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<sup>1</sup>1990 Cable Report, 5 FCC Rd. 4962 (1990)

documented.<sup>2</sup> Basically, the concerns over vertical and horizontal concentration in the cable industry emanate from the anticompetitive incentives that are obtained when the owner of the wire also has a vested interest in the content that is transmitted over the wire. Other competing programming services, including local television stations, bear the brunt of these anti-competitive incentives.

At its core, the problem with concentration in the cable industry stems from its monopoly position in each local cable community. Cable is the sole gatekeeper. By increasing its subscriber base, large MSOs are able to multiply power of each local monopoly. Manifestations of this power can be seen in the ability of large MSOs to extract ownership interests from otherwise independent programmers and to discriminate against competitors in the distribution of program product. Thus, cable's vertical concentration stems from its ability to concentrate horizontally.

INTV readily admits there is both vertical and horizontal combinations in broadcasting. Our complaint is not against vertical and horizontal combinations, *per se*. Cable is unique, however, because there is a local monopoly at the final distribution point. Vertical and horizontal combinations in television broadcasting do not end in a local monopoly franchise. There are numerous television stations in local markets, all

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<sup>2</sup>See House Committee on Energy and Commerce, H.R. Rep. No. 102-628 (House Report), 102nd Cong. 2nd Session (1992); Senate Committee on Commerce, Science and Transportation, S Report No. 102-92, (Senate Report), 102nd Congress 2d Session (1991).

competing against each other.<sup>3</sup> Moreover, the Commission has seen fit to enact limits on local and national horizontal concentration in broadcast television.<sup>4</sup> Cable presents a more compelling case for horizontal and vertical restraints.

### SUBSCRIBER LIMITS

INTV believes there should be both national and local horizontal limits. As the House Report indicates, the FCC's concern in creating such limits should not be strictly limited to traditional antitrust analysis.<sup>5</sup> The FCC has an affirmative duty to foster competition and diversity.

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<sup>3</sup>In television broadcasting, the Commission has found that the networks have significant bargaining power, requiring some form of vertical concentration restraints, i.e. the financial interest and syndication rules. See Report and Order in Docket No. 90-162, 6 FCC Red. 3094 (1991), modified on recon., 2 FCC Rd. 345, vacated and remanded sub.nom. Schurz v. FCC - F.2d -(7th Cir. 1992). INTV obviously supports these restraints. However, because of its monopoly status, the cable industry presents, at a minimum, an equalling compelling case for vertical and horizontal restraints.

<sup>4</sup>Indeed, the local ownership restrictions on television stations appear to have the perverse effect of limiting the competitive viability of television stations. Regardless of the FCC's actions in this proceeding, television stations will still be competing against a multi-channel monopoly in each local cable community. As the FCC noted previously, this competitive environment places local stations, which can offer only one channel, at a competitive disadvantage. The Commission has noted that smaller predominantly independent stations may go dark by the end of the decade. Florence Setzer, Jonathan Levy, Broadcast Television in a Multichannel Marketplace, FCC Office of Plans & Policy, June 1991 at ix. We have reached the point where relaxation of the television ownership restrictions is necessary to ensure that a free, off-air television service will be able to compete against multi-channel wired distribution systems.

<sup>5</sup>See House Report at 42.

National Ownership Limits: Currently, the FCC limits nationwide ownership of television stations to 25 percent of the national audience. This limit exists even though there are numerous competing television stations in each local market. Cable presents a more extreme situation. Because an MSO is the sole information gatekeeper in its franchised area, it serves as the conduit for its own programming and competing program services. Thus, its power to influence the development of new programming services at the national level is tremendous. This calls for a stricter standard than that applied to television stations.

The Commission has proposed establishing a national limit at 25 - 35 percent of homes passed. This standard is far too liberal. Importantly, the two largest cable MSOs in the country, TCI and Time/Warner each reach 24 percent of homes passed and 12 percent of homes passed respectively.<sup>6</sup> Clearly, Congress was concerned about the level of concentration in the *status quo*. Establishing a national standard which merely institutionalizes the problem is not consistent with the spirit of the statute. Creating a 25 - 35 percent limit would not only permit existing anti-competitive incentives to continue but also permit even more concentration. Congress certainly did not intend for the FCC to enact regulations that would let the problem get worse. Indeed, the 1992 Cable Act

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<sup>6</sup>INTV supports the "homes passed standard" as the appropriate measure for analyzing a cable system's reach. It encompasses all television households and provides a more stable statistic than "subscribers". See Report and Order in MM Docket No. 82-434, 7 FCC Red. 5781 (1992).

made the following findings:

(4) The cable industry has become highly concentrated. The effects of such concentration are barriers to entry for new programmers and a reduction in the number of media voices available to consumers.

(5) The cable industry has become vertically integrated; cable operators and cable programmers often have common ownership. As a result, cable operators have the incentive and ability to favor their affiliated programmers. This has made it more difficult for non-cable-affiliated programmers to secure carriage on cable systems. Vertically integrated program suppliers also have the incentive and ability to favor their affiliated cable operators over non-affiliated cable operators and programming distributors using other technologies.

The House Report concluded:

In general, the Committee believes that concerns raised regarding increased vertical and horizontal concentration are serious and substantial. The Committee believes that it is critical for the FCC to consider whether, and to ensure that, the structure of the industry is suited to service in the public interest.<sup>7</sup>

Given this concern, it makes little sense to enact regulations that permit the *status quo* to remain.

In the context of network cable cross ownership, INTV proposed a 5 percent national audience limit. We continue to believe that, because of cable's local monopoly characteristics and the market power derived therefrom, this standard makes sense as applied to cable's national ownership limits.

Nevertheless, the FCC determined that in the context of network-cable cross ownership, network cable combinations should reach no more than 10 percent of cable homes passed nationwide.

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<sup>7</sup>House Report at 43.

INTV believes this should be the maximum ownership limit for all cable MSOs.

The Notice notes that the standards enacted in the network-cable cross ownership context may not be relevant to rules enacted for non-network owned cable systems. However, it fails to explain why disparate treatment is appropriate. Admittedly, network-cable combinations give rise to unique considerations, because the network is affiliated with a broadcast station in the local market. As we noted the potential for anticompetitive behavior between the affiliate and the local cable operator is significant. However, the fundamental concerns about controlling access by independent cable programmers and the potential for discrimination is the same, regardless of a network connection. Congress found that existing cable MSOs exercise market power with respect to program access and favoring their own programming services. Therefore, remedial action is warranted. In a perfect world, the FCC should limit all existing MSOs to a maximum 10 percent national audience reach limit.

The Senate Report states the legislation does not imply that any existing combinations must be divested.<sup>8</sup> While the Senate Report does not compel the FCC to divest existing MSOs, there is nothing in the Report prohibiting the FCC from ordering divestiture in certain circumstances. That decision has been left to the Commission.

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<sup>8</sup>Senate Report at 34.

INTV recognizes that it is unlikely the FCC will order the divestiture of any existing MSOs. Nevertheless, the FCC could enact national ownership limits and apply them prospectively, similar to its television ownership policies. Thus, MSOs exceeding the benchmark would be precluded from increasing their cable system portfolios. Also, if there is a transfer of control of an MSO, the new owner would be prohibited from acquiring systems which exceed the benchmark. Thus, as cable systems are sold and transferred, existing MSOs would be brought into compliance with the new rules.

Local Ownership Limits: The Notice solicits comment on the establishment of local or regional ownership limits. Certainly, SATCOM's complaint in the 1980s regarding TCI's ownership of all cable systems in Montana crystallizes the need for such limits.

From INTV's perspective the issue is whether cable systems can use their monopoly power to distort competition in the local marketplace. We believe they can. The power of cable to manipulate its competition increases as it begins to control more and more cable systems in the local market. In extreme examples, one single cable operator can serve as the conduit for all competing broadcast signals in that market. Moreover, new local cable program services, such as Albritton's Channel 8 in Washington, and Tribune's Chicago Land Service, would become captive to the whims of a single cable owner. Of particular importance is the impact cable concentration will have on local advertising markets. In markets where there is only one cable operator, that operator becomes the conduit for all local

advertising. Other local media, such as television stations and independent local cable services, which compete with the cable operator for local advertising find themselves at a considerable disadvantage.<sup>9</sup>

The key issue is to define the "geographic" boundaries of the local market. The local market should be defined in terms of Arbitron's Area of Dominant Influence (ADI). First, the ADI is a universally accepted measure of a local television market. To the extent off-air television stations are the only real competitors to cable today, the ADI offers an appropriate geographic definition. Second, the FCC used the ADI concept in crafting local ownership rules for network-cable combinations. Finally, when defining the local market for must-carry purposes, the 1992 Cable Act relied on the ADI concept. Employing the ADI definition would provide a universally recognized definition and assist administrative consistency.

INTV believes the FCC should prohibit a single cable operator from reaching more than 50 percent of the homes passed in a local market (ADI). This standard is consistent with the FCC's recent decision in the network-cable cross ownership proceeding.

As noted above the concerns leading to the creation of this standard are not limited to network-cable combinations. The

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<sup>9</sup>Local businesses purchasing advertising time may also be disadvantaged. The local advertising market for television is highly competitive with several television stations competing for advertising dollars. If there is only one cable operator in a local market, however, that cable operator is in a tremendous position to dictate local advertising prices.

potential for one cable operator to dominate a local market exists independent of network ownership. Moreover, the potential adverse impact on the local advertising market must be considered. It is simply unwise to let one cable operator serve as an information gatekeeper to an entire local market. Regardless of any local rules, cable will always be a monopoly provider in each cable community. There are no sound policy reasons for permitting cable operators to increase this market power by dominating the entire local market.<sup>10</sup>

#### CHANNEL OCCUPANCY LIMITS

Section 11 of the 1992 Cable Act requires the FCC to "prescribe reasonable limits on the number of channels on a cable system that can be occupied by a video programmer in which a cable operator has an attributable interest." It is clear from the Senate Report that the Congress intended the FCC to enact at least some limits on channel occupancy.<sup>11</sup>

The legislation and the Commission's Notice attempt to balance conflicting goals. On the one hand Congress was concerned about existing levels of vertical integration in the cable industry. Alternatively, Congress recognized the benefits of vertical integration in the development of cable programming channels.

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<sup>10</sup>The question of divestiture is also raised by the enactment of local cable ownership rules. As discussed, supra, the Act gives the FCC discretion in this area. Nevertheless, the FCC may want to apply these rules prospectively to avoid divestiture problems.

<sup>11</sup>Senate Report at 80.

However in recent years cable's ability to vertically integrate has become a mechanism for extracting equity interests from otherwise independent programmers and limiting the development of independent services.

INTV recognizes that the Senate Report addresses the issue in terms of a percentage of a cable system's channel capacity. The goal being that a large portion, perhaps 80 percent, of an MSO's channel capacity be devoted to independent program sources. Nevertheless, INTV questions whether a percentage based approach will accomplish the statute's goals.

Unfortunately, a channel occupancy limit based on a percentage of a system's channel capacity will have little relevance as systems expand their capacity. What impact will the occupancy limit have on a cable system with 500 channels or fiber optic system with "infinite" capacity? In these instances, a percentage limit would permit a large MSO to own and program an infinite number of cable channels. It is true that independent programmers would likewise have more channels on which to gain access. Realistically, however, the cable MSO is in a superior position to secure the program distribution rights from Hollywood. As a result, while a "percentage" channel occupancy limit may make channels available, it does not curtail an MSO's ability to dominate the program acquisition market.<sup>12</sup> Vertical concentration could increase under a percentage set aside system. Accordingly, Congress' goal of stimulating new independent program sources may

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<sup>12</sup>See discussion infra at 12.

never be realized.

One way to avoid increased vertical integration in the cable industry would be for the FCC to establish an upper numerical limit on the number of program channels that could be owned by any one cable company. For example, the FCC may want to freeze the number of cable program services currently owned by cable MSOs. This would insure that new programming services would be independently owned.

Alternatively, for existing systems a channel occupancy set aside based on a percentage of the system's capacity may be helpful in the short run. This is especially true for an MSO such as TCI, which has an ownership interest in 22 cable networks. On some of its smaller systems, the TCI owned channels could take up a majority of the system's capacity. In calculating the percentage limit the FCC may want to subtract the number of channels actually used by a cable operator to fulfill its must-carry, leased access and government PEG channels, in determining the channel occupancy set aside. Also, even though pay services, such as HBO, and pay-per-view services are not received by all subscribers, they should be counted towards a system's occupancy limit. After all, these services are owned by large cable MSOs. They represent the type of vertical integration which the legislation was designed to address.<sup>13</sup>

To solve both the short and long run problems, INTV recommends

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<sup>13</sup>The same holds true for multiplexed cable services. Channels devoted to these services should be counted towards the percentage set aside.

a two step regulatory structure. First, existing cable operators should be permitted to devote no more than 20 percent of existing channel capacity to program services in which they have an equity interest. Second, in all instances, the absolute number of program services (in which a cable MSO has an equity interest) appearing on a cable system cannot exceed the number of services owned by the MSO on February 9, 1993.

This two step rule is a superior solution to the long and short term problem in the cable industry. In the short term it would free up channel capacity on existing systems. However, preventing cable companies from increasing their holdings in program services would insure that independent programmers are able to secure the initial program rights necessary to create new cable program services. Such a proposal would not require an MSO to divest its existing program services. However, the FCC may want to contemplate a rule which would require an MSO to "spin off" these services when there is a transfer of control.

#### PARTICIPATION IN PROGRAM PRODUCTION

The Commission's Notice reaches the tentative conclusion that limits on program production and participation are not necessary because of the ownership and channel occupancy limits that it will place on the cable industry pursuant to the Act. Also, the FCC believes Sections 12 and 19 of the Act, which prohibit cable operators from extracting financial interests as a condition of carriage and discrimination in the sale of programming to small

cable systems and other multichannel suppliers, obviate the need for program production limits.

The FCC is only partially correct. First, if the FCC wishes to rely on its "subscriber" and channel occupancy limits, then it must adopt meaningful restrictions. However, the Notice evidences a desire to at least maintain the *status quo* with respect to subscriber limits. As noted above, channel occupancy limits based on a percentage of channel capacity will have little impact on vertical integration as channel capacity expands. If the FCC proceeds to enact regulations that maintain the cable industry's current status, then it is incumbent on the Commission to enact strict rules limiting participation in programming.

The Commission's Notice appears to ignore the relationship between increased concentration by cable and its ability to dominate the program acquisition and production markets. The FCC has focused on controlling the distribution and transmission side of the equation. While limits on distribution are very important, they will not, by themselves, effectively curb increased vertical concentration in the cable industry. The issue is more than discrimination by cable operators with respect to access to cable systems or the sale of cable program services to other multichannel providers. Rather, the issue is whether cable can use its leverage to prevent development of new, independent program sources.

Congress was clearly concerned over potential harm that exists in the *status quo*. Cable is in a position to dominate the program production and acquisition market. Vertically owned cable program

services are already gaining control over college and professional sporting events. In addition, vertically owned programming services have become deeply involved in purchasing the rights to first run and off-network programs. The restraints proposed by the FCC do not address this issue.

The FCC has acknowledged that when a purchaser of programming has significant bargaining power over producers, restraints on financing, production and distribution are appropriate. The same theory applies to cable companies. If the FCC truly wants to create an environment that fosters diversity, through the development of independent program services, then it should limit the participation and production of programming by the largest cable MSOs.

One way to accomplish this task is to limit participation in programming to those services already owned by cable systems. For example, TCI would be limited to its current program holdings. It would be precluded from owning an equity interest in any new cable programming services. Such a limitation would create incentives for new independent cable programmers to develop new product and services.

Even this solution is not perfect. As the FCC notes, TCI has an equity interest in 22 programming services. Thus, even if the *status quo* is maintained, large MSOs such as TCI and Time/Warner wield significant power in program production and acquisition. Thus, it may be desirable to impose limits on the financial interests these companies may have in the development of program

product. Moreover, the distribution and sale of such programming should be accomplished by a completely independent company.

INTV understands the FCC's belief that vertical integration in the cable industry has stimulated the development of cable and cable program services. Nevertheless, cable has now matured into a telecommunications giant. Independent program companies are ready, willing and able to develop services for cable systems. As we move into the next century, there is no need to continue a policy that permits the owner of a monopoly pipeline to also control content. Many of the problems cited by Congress stem from this relationship. The time has come for the FCC to enact rules which limit program participation by large cable MSOs.

#### DEFINITION OF OWNERSHIP

A common thread running throughout this proceeding is how to define ownership in the context of these new regulations. The FCC suggests using the "attribution" rules currently employed in the regulation of broadcasting. 47 C.F.R. 73.3555.

INTV does not believe the attribution criteria applied to broadcast stations is particularly relevant to the vertical and horizontal regulations in question. As the Notice itself indicates, the broadcast attribution rules were "intended to include ownership thresholds which may impart the ability to either influence or control management or programming decision of a broadcast licensee."<sup>14</sup> These rules are appropriate for a service

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<sup>14</sup>Notice at para 38.

which is not based on a local monopoly franchise. In broadcasting, the ability to influence diversity and manipulate the market is tempered by the existence of other local broadcasters. Moreover, the power of a local television station is even more attenuated by the fact that it must compete with a multichannel monopoly service in each local cable community.

Because cable occupies such a unique gatekeeper position, a stricter standard of ownership should be applied. This is especially true with regard to the proposed channel occupancy limits. These rules are designed to free up channel capacity for independent program sources. Financial interests in such program sources, however small, create the adverse incentives the FCC is seeking to remedy.

The FCC itself has recognized the need for tighter attribution standards as originally applied to the common ownership of wireless cable and cable systems. Standards, similar to those the Commission employed in the context of cable-telco cross ownership are more appropriate to ensure that monopoly influence will not exist. The FCC simply cannot ignore the fact that, as local monopolists, cable systems have far greater power in local markets as compared to television stations.

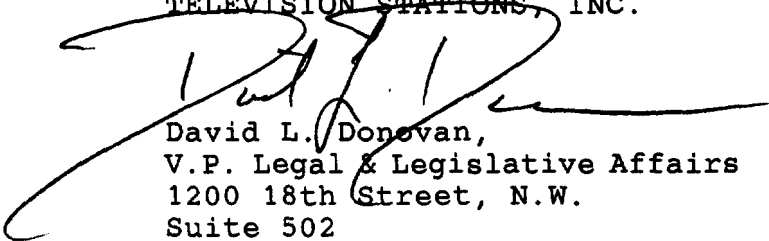
#### CONCLUSION

INTV believes that vertical and horizontal concentration limits on cable systems are necessary. In crafting these requirements, the Commission should not simply ensconce the status

quo. Congress was concerned over the existing levels of concentration in the cable industry. Importantly, the FCC must recognize that cable's monopoly power dictates a different set of rules than those applied to over-the-air broadcasting.

Respectfully submitted,

ASSOCIATION OF INDEPENDENT  
TELEVISION STATIONS, INC.



David L. Donovan,  
V.P. Legal & Legislative Affairs  
1200 18th Street, N.W.  
Suite 502  
Washington, D.C. 20036  
(202) 887-1970

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